Faster, Higher, and Stronger: Why athletes should have the choice to use performance-enhancing drugs

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I. PERFORMANCE-ENHANCING DRUGS SHOULD BE A LEGAL PART OF SPORTS

Athletes…Do you want to recover quicker, increase energy and endurance, run faster, and lift heavier? Would you take performance-enhancing drugs if they were legal? Well Barry Bonds, Olympic athletes, Rafael Palmeiro, NFL players, NCAA players, MLB players, and 1.5% of high school seniors have all excelled by using performance-enhancing drugs. Modern athletics faces common problems created by the unrealistic and misguided prohibition of performance-enhancing drugs. This note offers a solution to these problems by suggesting a framework that gives athletes the choice to use performance-enhancing drugs, under medical supervision. This will allow athletes to more safely reap the benefits of these drugs while minimizing their adverse risks.

Whether random and suspicionless drug testing occurs in high school, college, or professional leagues, it faces the same six problems. First, drug tests conducted without cuase

6 ESPN, supra note 3.
and based only upon the individual being an athlete invades an athletes’ privacy. Scientific inability to design tests that catch new drugs and testers using new drugs is another problem. Further, a cloud of suspicion hangs over all athletes’ heads no matter whether they do or do not use performance enhancing drugs because most assume any extraordinary feat must have been accomplished with drug use. Currently or soon-to-be-available gene therapy or genetic doping could make all testing obsolete because the substance would be manufactured by the athlete’s body and not consumed or injected. Applying strict liability principles to positive tests results in unfair or unreasonable situations. A final problem is the idea that the money spent on drug testing can be used in better fashions.

The first section details the science behind two of the most popular performance-enhancing drugs, and then turns to discuss the development of the current drug-testing systems and several of its flaws. The second section lays out the proposed legislation and demonstrates how this solution fixes the problems the current regime creates.

II. MEDICAL RESEARCH, DRUG TESTING, AND CURRENT PROBLEMS

The general public often misunderstands these materials due to an incomplete introduction, and subsequently a lack of understanding of the substances. Performance-enhancing drugs are substances that athletes take in order to help them perform better on their respective field of play – to enhance strength, power, endurance, lean muscle mass, and recovery time. The most

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9 Connolly, supra note 2.
10 Buster Olney, Howard Drives Ball To All Fields, espn.com, Sept. 11, 2006, http://insider.espn.go.com/espn/blog/index?entryID=2575491&searchName=olney_buster
12 Connolly, supra note 2.
popular substances used by athletes to improve their performance are anabolic-androgenic steroids, human growth hormone, erythropoietin, amphetamines, ephedrine, and caffeine. While many drugs improve athletic performance, this note will focus upon anabolic-androgenic steroids and human growth hormone and leaves for another time the inclusion of other drugs. The following sections provide an introduction to both anabolic-androgenic steroids and human growth hormone.

A. Anabolic-Androgenic Steroids

Testosterone is the primary male sex hormone that helps regulate “muscle protein metabolism, sexual and cognitive functions, erythropoiesis, plasma lipids, and bone metabolism.” Medical science created synthetic derivatives of testosterone, which are called anabolic-androgenic steroids, anabolic steroids, or steroids. Anabolic-androgenic steroids “maximize anabolic and minimize androgenic effects,” and may be taken orally, by injection, by patch, or by gel. The primary therapeutic uses of anabolic-androgenic steroids “are to treat delayed puberty, some types of impotence, and wasting of the body caused by HIV infection or other diseases.” Anabolism is the creation of lean body mass “through stimulation of protein synthesis and/or a reduction in protein breakdown.” Anabolic effects accelerate “muscle, bone, and red blood cell growth” and enhance neural conduction. Androgenic effects change sexual

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17 Id. at 534.
19 Id. at 535.
21 Evans, supra note 16. (citing Kuhn CM, Anabolic Steroids, Recent Prog Horm Res. 57:411-434 (2002).
characteristics like genital enlargement, hair growth, and aggressiveness. Anabolic-androgenic steroids impact the musculoskeletal system when used in supraphysiologic doses by increasing lean body mass, muscle size, and strength. Further, steroids help improve protein metabolism, bone metabolism, collagen strength, and bone mineral density. Individuals using anabolic-androgenic steroids generally take doses above 300 mg per week and combine this with strength training to maximize effects. Typically, athletic users stack anabolic-androgenic steroids by taking several types at once. They create a cycle or regimen that is followed for four to twelve weeks, over which the athlete gradually increases the dose.

However, stacking anabolic-androgenic steroids may not be as important as the amount used because the effect of the steroids is based on the total testosterone concentrations in the body available for use. Further, it appears that smaller doses of anabolic-androgenic steroids than those typically used may result in the same anabolic benefits to the users. The time period between cycles helps to clear the body of the excess testosterone and allows several of the minor

23 Id.
24 Supraphysiologic means a larger dose than the body would normally create on its own. Thus, if the body typically makes 1 unit of testosterone per week then, a dose of 3 units per week would be a supraphysiologic dose.
25 Evans, supra note 16.
28 Id.at 536.
29 Id.
31 Id.
32 Id.
adverse effects, such as acne, depressed natural testosterone production, or injection-site pain, to reverse themselves.\textsuperscript{33}

Side effects are typically benign or reversible, and serious health problems are rare.\textsuperscript{34} Due to this, most anabolic-androgenic steroid side effects have been exaggerated because the majority of side effects are not serious.\textsuperscript{35} Most anabolic steroid users suffer from at least one minor visible side effect, such as acne, testicular shrinkage, male breast matter, stretch marks, or injection site pain.\textsuperscript{36} Adverse side effects caused by using high doses of anabolic-androgenic steroids can be broken down into several categories, including: cardiovascular, liver, skin, hormone or reproductive, behavioral, tendon rupture, and injection related problems.\textsuperscript{37} High doses of anabolic steroids can increase blood pressure, increase cholesterol, thicken the heart’s left ventricle, and decrease triglyceride levels.\textsuperscript{38} Anabolic steroids can increase liver enzymes, which affects liver function.\textsuperscript{39} This effect is seen mostly when taking orally administered anabolic steroids.\textsuperscript{40} Anabolic steroids can cause acne, stretch marks (the muscles grow faster than the skin), male-pattern baldness, and can increase hair growth in other areas like the back or chest.\textsuperscript{41} Using anabolic steroids can depress luteinizing hormone, which in males can cause testicular shrinkage, reduced sperm count, and infertility while in females it can increase hair growth, deepen the voice, reduce breast tissue, cause male-pattern baldness.\textsuperscript{42}

\textsuperscript{33}Evans, supra note 16.
\textsuperscript{34}Id. at 537.
\textsuperscript{36}Id. at 537.
\textsuperscript{37}Id. at 537-539.
\textsuperscript{38}Id. at 537.
\textsuperscript{39}Kutscher, supra note 30.
\textsuperscript{40}Evans, supra note 16.
\textsuperscript{41}Id. at 537.
\textsuperscript{42}Id. at 538.
Anabolic-androgenic steroids cause aggression and may cause depression or mania but they also have been used to improve mood and fight depression.\textsuperscript{43} Tendon rupture appears to be caused by anabolic steroids because it makes them less elastic and while the strength is unaffected it is possible that the tendons become the weakest link after anabolic steroids cause muscles to develop rapidly.\textsuperscript{44} Finally, many anabolic steroid users suffer injection related side effects such as infection, inflammation, bacterial abscesses, cross-infection, and injuries to the nerves resulting from misplaced injections.\textsuperscript{45}

However, using 600 milligrams (mg) a week of anabolic-androgenic steroids per week in cycles lasting less than twelve weeks appears to cause few side effects.\textsuperscript{46} Several studies note that “[s]ignificant increases in muscle size and strength occur only with doses of 300 mg/week and higher.”\textsuperscript{47}

B. Human Growth Hormone

Human growth hormone (HGH) is another popular performance-enhancing drug used by athletes. HGH is regulated by the pituitary gland and is responsible for human growth and development, especially during the years of puberty.\textsuperscript{48} Human growth hormone reaches maximum amplitude in puberty and begins to decrease slowly throughout one’s life until it reaches negligible levels by the onset of old age.\textsuperscript{49} Normal human growth hormone production is

\begin{thebibliography}{99}
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\bibitem{43} Id. at 538.\textsuperscript{a}
\bibitem{44} Id. at 539.
\bibitem{45} Id. at 538.
\end{thebibliography}
affected by both exercise and diet.\textsuperscript{50} Human growth hormone helps to stimulate “insulin-like growth factor (IGF-1),”\textsuperscript{51} which is a natural protein that helps human growth hormone act within the body.\textsuperscript{52} HGH’s synthetic version was developed in 1983 and is approved to help children and adults with a growth hormone deficiency, girls suffering from Turner Syndrome, and children with chronic renal failure.\textsuperscript{53} HGH is taken by injecting the drug into the bloodstream.\textsuperscript{54}

Human growth hormone has been called the fountain of youth. Adults increasingly use human growth hormone prescribed by anti-aging doctors to counteract general aging problems because it has been shown to increase lean body mass, decrease body fat, increase skin thickness, which helps wrinkle and sagging skin problems, and increase bone density.\textsuperscript{55} Further, human growth hormone has been shown to boost energy, mood, and quality of sleep.\textsuperscript{56} Possible side effects occurring from long-term human growth hormone use includes fluid retention, carpal tunnel,\textsuperscript{57} acromegaly,\textsuperscript{58} and enlarged internal organs.\textsuperscript{59} Further, there are some indications that human growth hormone, when used alone, does not increase overall strength despite the increase of lean body mass and bone density.\textsuperscript{60}

Despite this and its high cost, athletes continue to use human growth hormone.\textsuperscript{61} Female athletes would seem to gain the most from using HGH because they would not suffer any of the

\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Freudenrich, supra note 48.
\textsuperscript{53} Dean, supra note 49.
\textsuperscript{54} Rogol, supra note 14.
\textsuperscript{57} Dean, supra note 49.
\textsuperscript{58} Acromegaly is the overgrowth of hands, feet, and/or the face.
\textsuperscript{59} Freudenrich, supra note 48.
\textsuperscript{60} Dean, supra note 49.
\textsuperscript{61} Id. at 250.
androgenic effects caused by taking anabolic steroids.\textsuperscript{62} It appears that athletes take HGH for its anabolic effects.\textsuperscript{63} Athletes typically combine human growth hormone with other performance-enhancing drugs.\textsuperscript{64} It seems that athletes take HGH in conjunction with anabolic steroids because it helps prevent some of the injuries caused by steroids because HGH strengthens bones and ligaments so that they can withstand the increased force generated by new, larger muscles.

C. Current Legislation

The federal government has increasingly regulated performance-enhancing drugs in broadly constructed national drug laws. In 1988, the Food, Drug, and Cosmetic Act (FDCA) made distribution of steroids a felony.\textsuperscript{65} In 1990, Congress inserted anabolic-androgenic steroids into the Controlled Substances Act and classified them as a Schedule III substance because of their recognized medical uses.\textsuperscript{66} In 2004, Congress made anabolic steroid precursors\textsuperscript{68} illegal.\textsuperscript{69}

In 1990, Congress prohibited distribution of human growth hormone by amending the FDCA – making it illegal to distribute or intend to distribute human growth hormone for reasons not recognized by medicine and without a valid prescription.\textsuperscript{70} Recognizing the possible risks that HGH poses, several states also passed legislation regulating its use or distribution.\textsuperscript{71}

\textsuperscript{62} Id. at 252. (Heather Dean, \textit{Does Exogenous Growth Hormone Improve Athletic Performance?}, Clinical Journal of Sports Medicine, 12: 250, 252 (2002).)
\textsuperscript{63} Rogol, \textit{supra} note 14.
\textsuperscript{64} Dean, \textit{supra} note 49.
\textsuperscript{66} There are five schedules ranging from I-V. The most dangerous drugs with the least amount of medical usage are classified as Schedule I and over the counter medications are Schedule V.
\textsuperscript{68} Steroid precursors are substances the human body uses as building blocks to create steroid hormones as part of its natural functions and maintenance.
\textsuperscript{69} 21 C.F.R. § 1308.01 (2005).
\textsuperscript{71} Collins, \textit{supra} note 65.
D. Drug Testing

Drug testing is a complex process that has slowly pervaded and become accepted in America despite its uncertain future and many problems. Drug tests can only test for specific, known substances so they must continually evolve to catch all the newly developed drugs that are being added to the ever-growing list of banned substances. Drug testing requires urine, blood, or hair to discover whether an athlete has been using a banned substance by utilizing different testing machines, including: gas chromatography, mass spectrometry, and immunoassay. In gas chromatography, the sample is vaporized and sent through a long part of the machine. Each specific substance returns to liquid or solid form at different points creating a chromatogram, which allows testers to exactly determine the sample’s contents. In mass spectrometry, the sample is destroyed by an electron beam and accelerated down a long, magnetic tube where based on the weight of the substance it land in different positions. An immuno-assay test works by mixing a solution containing a specific radioactive anti-body that will bind only to the specific substance being tested. The amount of radioactivity can be measured to determine how much of the substance exists in the sample. Today, scientists are trying to design a reliable test to detect some performance-enhancing drugs, particularly HGH. These tests, among others, are used to determine what substances exist in the athlete’s body.

1. History of Drug Testing

The movement to random, suspicionless drug testing began in the middle of the 1980’s when the Supreme Court determined that employers could require such tests because it did not

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72 Freudenrich, supra note 48.  
73 Id.  
74 Id.  
75 Id.  
76 Id.  
77 Id.  
78 Dean, supra note 49.
constitute an illegal search and seizure and thus did not violate the Fourth Amendment.\textsuperscript{79} Since then, and in connection with the ever-expanding “war on drugs,”\textsuperscript{80} drug tests now pervade the workplace and schools.\textsuperscript{81} Typically, courts have upheld random, suspicionless drug tests because “the interest of the searcher outweighs the interests of the individuals being searched in their expectation of privacy.”\textsuperscript{82} Accordingly, drug tests have spread to all levels of athletic competition.

In 1995, the Supreme Court permitted drug testing high school athletes.\textsuperscript{83} In\textit{ Vernonia Sch. Dist. 47J v. Acton}, the Court held that student-athletes had a lowered expectation of privacy and therefore should expect intrusions upon their privacy to help deter the drug problems within school, by making sure that the student-athletes did not use drugs.\textsuperscript{84} Drug testing has also moved into colleges across the country and was mandated by the NCAA in order “to safeguard the integrity of intercollegiate athletic competition and to protect the health and safety of student athletes.”\textsuperscript{85} Initially, the professional leagues treated drug testing as though it was a workplace situation, which meant that it was left to be resolved in collective bargaining.\textsuperscript{86} Typically, collective bargaining resulted in no testing or a very limited regimen that largely protected the athletes’ interests and rights because strong player unions refused to allow drug tests.\textsuperscript{87}

Recently, several high profile athletes admitted to using performance-enhancing substances, and as a result, most of the professional leagues have changed their policies to allow

\begin{thebibliography}{8}
\bibitem{80} PBS, \textit{Thirty Years of America’s Drug War}, (2006) \url{http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/}.
\bibitem{82} Vernonia, \textit{supra} note 81.
\bibitem{83} Id.
\bibitem{84} Id.
\bibitem{85} Hill v. NCAA, 865 P.2d 633 (Cal. 1994).
\bibitem{87} Id.
\end{thebibliography}
drug testing. Particularly, Major League Baseball, after years of not conducting any type of
drug tests, banned and started testing for performance enhancing substances in 2002. Those
policies were strengthened only after Congress decided to become more involved by holding
hearings regarding steroid use and threatening to enact federal legislation to control all
professional sports drug testing policies. Currently, professional sports teams now test for most
of the known performance-enhancing drugs.

2. Future of Drug Testing

In the war against performance-enhancing drugs, the hard evidence of a positive result in
current drug tests may be bypassed in the future by two controversial drug test proposals. The
first suggested test is to use “non-analytical positive evidence.” This method would not require
urine, blood, or hair test results, but would instead focus on evidence that “indicated purchase or
use of undetectable or difficult-to-detect drugs by athletes.” For example, consider the situation
where the police catch a football player’s trainer with an undetectable, designer steroid, and the
football player had increased his strength or performance noticeably within the past two years.
Despite never testing positive for a performance-enhancing drug or authorities finding any direct
use of the steroid by the football player, the player would still be punished according to his
league’s rules. This is controversial because circumstantial evidence will be allowed to convict a
player instead of the current reliance on an actual performance-enhancing drug found in his body
and circumstantial evidence is not as dependable.

88 Id.
90 Id.
91 Paul A. Fortenberry & Brian E. Hoffman, Illegal Muscle: A Comparative Analysis of Proposed Steroid
Legislation and the Policies in Professional Sports’ CBAs That Led to the Steroid Controversy, 5 VA. SPORTS &
92 James A.R. Nafziger, Circumstantial Evidence of Doping: BALCO and Beyond, 16 MARQ. SPORTS L.J. 45, 47
(2005).
93 Id.
The second future option suggests using “athletic profiling.” This method would require rigorous physical examinations of all athletes to create individual biological profiles that would form a base for comparison. For example, an athlete’s height, weight, body fat, vertical jump, agility, speed, and strength, and DNA would be measured and tested. These profiles would then be examined to determine if any surprising developments of athletic ability were legally gained. In this test, the controversy lies in the profiles’ subjective nature. Every individual athlete develops physically and improves skill-wise at different times and a problem exists in deciding what standard of improvement to use. Another drawback of this system is the time, cost, and intrusiveness associated with a plan where every athlete would need to be tested and their information stored.

3. Problems with the Current Regulations and Testing Schemes

Drug testing schemes based upon random, suspicionless drug tests face six systemic problems. The first problem is that they inherently invade athletes’ privacy rights because personal information about their bodies is collected and distributed. There is also the ability or an ability in the future to abuse the urine, hair, or blood samples collected and tested for performance-enhancing drugs. The blood samples could be used to determine an athlete’s vision, ability to handle pressure, personality traits, and ability to gain weight, potentially allowing coaches and organizations to use the information for player drafting, development, compensation, and on-field strategy. This degree of knowledge of individual athletes imposes an even greater invasion of their privacy.

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94 Id.
95 Id.
96 Id.
97 Id.
98 Traband, supra note 8.
Second, scientists are unable to proactively design tests to catch new and existing drugs like designer steroids, EPO, and HGH.\textsuperscript{99} Accordingly, they are also unable to impede the ever-burgeoning black market of new or designer performance-enhancing drugs\textsuperscript{100}.

Third, due to the inconsistent testing and the scientific inability to detect all performance enhancing substances, a cloud of suspicion hangs over all athletes’ heads, questioning whether they use performance-enhancing drugs.\textsuperscript{101}

Fourth, the current or soon-to-be available threat of gene therapy or genetic doping requires a drug test to be developed at the expense of even greater privacy rights.\textsuperscript{102} This is because each athlete’s DNA must be tested and determined to be naturally occurring or lab modified.

Fifth, drug tests make athletes strictly liable for all substances they ingest, often resulting in outrageous and unfair penalties.\textsuperscript{103} This is so because the number of banned substances is so great and the athlete is responsible for knowing every substance and for ensuring that they do not ingest any of them.\textsuperscript{104} Thus the time required to ensure compliance is immensely burdensome.\textsuperscript{105}

Finally, the extreme amount of money and resources spent on drug testing can be put to better use.\textsuperscript{106} Teams or leagues could invest that money on education programs, fund research into the latest techniques, invest in the team’s infrastructure, or bring in better players.

\section*{III. HOW TO GIVE ATHLETES THE CHOICE}

Scientists have shown that taking small doses of performance-enhancing drugs does result in benefits, without any noticeable adverse effect.\textsuperscript{107} Anabolic steroids and HGH helps make

\begin{flushleft}
\textsuperscript{99} Connolly, supra note 2.\\
\textsuperscript{100} Nafziger, supra note 92.\\
\textsuperscript{101} Olney, supra note 10.\\
\textsuperscript{102} Reaney, supra note 11.\\
\textsuperscript{103} Connolly, supra note 2.\\
\textsuperscript{104} Id.\\
\textsuperscript{105} Id.\\
\textsuperscript{106} National Federation of High Schools, supra note 13.\\
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athletes stronger, faster, and recover quicker.\textsuperscript{108} Athletes can perform at a higher level using performance-enhancing drugs, and can do so while minimizing their adverse effects.

\textit{A. Proposed Legislation}

Congress, along with the individual states, should pass laws allowing athletes to use performance-enhancing substances under medical supervision in order to create the safest environment possible. The first step towards implementing this goal is to classify human growth hormone as a schedule III or IV drug in the Controlled Substances Act. This would classify HGH in the same federal scheduling class as steroids, which would allow doctors to prescribe the drug to athletes, but would still regulate distribution and provide for supervised use. Next, the Controlled Substances Act should be amended so that a recognized medical use includes use for athletic performance.

After the drugs are reclassified, legislation prohibiting random, suspicionless drug tests of athletes for performance-enhancing drugs needs to be passed. This legislation would override professional sports leagues’ ability to use their employer-employee relationship in player contracts or in collective bargaining to continue random, suspicionless drug testing. Without this most teams or leagues could contract their way around the legislation. Next, a regulatory agency will be created to issue credentials to doctors that have acquired specialized knowledge of performance-enhancing drugs. Certified doctors will be allowed to prescribe performance-enhancing drugs for athletic performance. The group of accredited doctors will comprise a national database so that pharmacists can ensure legal distribution of performance-enhancing drugs. Doctors will exercise discretion based on their specialized knowledge to prescribe appropriate doses for each individual. Athletes using these substances can assume the risk of any negative side effects. Doctors will only be liable for malpractice by failing to properly educate,

\textsuperscript{107} Evans, supra note 16.
\textsuperscript{108} Evans, supra note 16; Dean, supra note 49.*
monitor, or inform the athlete of their condition. Finally, the legislation should prevent the various professional and amateur sports leagues from testing for performance-enhancing drugs to avoid the situation where the leagues make such testing a provision of the contract between the athlete and the team.

B. How this legislation will correct the current problems

This proposed legislation addresses and corrects the problems facing the current situation. This legislation will start restoring privacy rights to athletes who are tested for performance-enhancing drugs by eliminating drug tests that are very invasive to athletes’ privacy rights. The drug tests invade privacy right because visual monitoring is often required of the athletes when they provide their urine sample, the tests can often diagnose or provide information beyond what substances are specifically being tested for, and these tests are forced upon athletes randomly without individualized suspicion. Once drug tests for performance-enhancing drugs are prohibited, the lost privacy rights will be returned to the athletes.

The United States Supreme Court initially allowed random, suspicionless drug tests when holding that such tests were not a violation of privacy rights protected by the 4th Amendment. The Court upheld the constitutionality of these drug tests because the “interest of the searcher outweighs the interests of the individuals being searched and their expectation of privacy.”

With the new legislation, the interests of the searcher will no longer outweigh those of the searched because athletes can use performance-enhancing drugs legally. Further, athletes will be able to use individually tailored amounts in smaller doses so that their use will be safer, which prevents the classic argument that performance-enhancing drugs are necessarily banned because they are unsafe and dangerous. As scientists develop better tests they will also be able to test

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109 Traband, supra note 8.
110 Vernonia, supra note 81.
111 Id.
athletes’ blood for their DNA, vision, ability to handle pressure,\textsuperscript{112} athletes will be subjected to an even greater privacy invasion because this is information that they will not want to release. The availability of this information will lead to a greater likelihood of abuse by coaches, organizations, or agents that will be able to use it against the athlete for their own benefit. Thus, by preventing this type of drug testing athletes’ private information will not be available for misuse by these different groups. The solution is to stop drug testing for performance-enhancing drugs by allowing the athletes to use these drugs in a monitored setting.

A second problem this legislation stops is the cycle where the black market produces new and designer performance-enhancing drugs,\textsuperscript{113} the regulatory agencies’ scientists scramble to design tests in time to proactively catch these new and existing drugs,\textsuperscript{114} and once the scientists do so the black market produces or uses a new untested or unknown substance. The solution stops this merry-go-round process because athletes will be allowed to legally use performance-enhancing drugs under medical supervision, so the need to test for them will end.

In addition, by implementing this solution the rush to develop tests for EPO, human growth hormone, and genetic doping will halt because they will no longer be necessary. The black market for designer drugs will end because athletes will no longer need to use drugs that escape detection because there will be no one attempting to test for the drugs’ use. For example, Patrick Arnold, the chemist who created the previously undetectable “clear” steroid THG in his laboratory, created the new steroid so that it could bypass drug tests.\textsuperscript{115} Once athletes have access to existing steroid and human growth hormone drugs they will no longer need chemists creating new variations because they will have the very best drugs currently in existence. As stated

\textsuperscript{112} Penn, \textit{supra} note 98.
\textsuperscript{113} Nafziger, \textit{supra} note 92.
\textsuperscript{114} Connolly, \textit{supra} note 2.
above, this will destroy the demand for black market performance-enhancing drugs. Further, this will create a safer situation for athletes because they will have access to pharmaceutical grade drugs, will not need to use drugs created illegally and untested by chemists such as Patrick Arnold, and will be monitored by certified doctors. Also, athletes will not seek out designer drugs because they will have access to currently known and used performance-enhancing drugs and their variations. Athletes will be able to use performance-enhancing drugs with the knowledge that there are no unknown substances in the drug itself.

Another benefit of this solution will be to remove the cloud of suspicion that hangs over the heads of players excelling on the field.\textsuperscript{116} By making the use of performance-enhancing drugs legal, fans and reporters will be able to question and players able to respond without fear or prosecution. This will open and create discussion about performance-enhancing substances and by putting the discussion in the light it will remove the doubt the currently settles on every exceptional athletic performance. For example, Ryan Howard, who led Major League Baseball in home runs with fifty-eight in 2006,\textsuperscript{117} will no longer be bothered by the media constantly questioning his result because a player will be free to declare that they are an user or non-user. Further, there would be promotional opportunities open for all players, users and non-users alike. This is because some products like nutritional supplements or the drugs themselves will want to be associated with the best players that use that substance and other commercial products like sodas or cereals will want to be associated the players that support their or their customer’s viewpoints.

Of course, there could be some opportunity for a player to declare non-use while really taking performance-enhancing supplements, but this is no different than an athlete today who represents a certain ideal yet uses recreational drugs, cheats on their spouse, or commits some

\textsuperscript{116} Olney, \textit{supra} note 10.
other felony. In the long run, this solution will create greater transparency, which will benefit the players, the fans, and the sports because the use of performance-enhancing drugs can be discussed openly.

The questions and concerns brought by the threats of genetic doping and the requisite testing discussed above would be solved because the very private and personal information necessary to conduct a test would no longer be collected. Better techniques and education about genetic doping could take place because the issue could be discussed publicly. Further, since genetic dope testing will not occur, no test will need to be developed. This would prevent tests from being developed that would actually impose more of an invasion upon athletes’ privacy rights. The careful monitoring of genetic doping would help avoid many painful lessons that would be replicated and relearned around the world as different athletes struggled to harness the technology on their own. The increased communication would allow lessons one party learned to benefit other parties. Additionally, most of the impetus for genetic doping comes from the idea that endogenous production of crucial hormones or substances will be undetectable by current drug tests. Once athletes have access to performance-enhancing drugs they will no longer need to attempt to genetically modify themselves because the end result will already be available to them through this proposed legislation.

This rule change will correct the injustices of the previous system, which did not require any intent to do wrong. Known as strict liability, the mere presence of a banned substance in the athlete’s testing sample results in immediate punishment regardless of how or why the banned substance wound up in the sample. The use of strict liability principles damages many athletes’

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118 Reaney, supra note 11.
119 Nafziger, supra note 92.
careers and places an immense burden upon them that is unfair to each individual athlete.\textsuperscript{121} This solution will obviate strict liability burdens placed upon the athlete for performance-enhancing drugs because the athletes will no longer be tested for performance-enhancing drugs.

The sad story of Andreea Rudacan is perfect illustration of why strict liability is too harsh.\textsuperscript{122} In this case, Rudacan was a female gymnast in the 2000 Olympics, stripped of her gold medal by the IOC because her team doctor gave her cold medication containing pseudoephedrine, a banned substance, without her knowledge.\textsuperscript{123} Strict liability will no longer be necessary because once the proposed solution is in place, fair competition will encompass the use of performance-enhancing drugs and thus the policy support for strict liability will also be non-existent.

Finally, drug tests for performance-enhancing substances are very expensive to conduct, ranging from $80 and $120 per test.\textsuperscript{124} The money spent on running drug tests, their bureaucracy, and developing tests for new drugs can be better spent on other items such as education, athletic equipment, facilities, or athletic contracts.

The proposed legislation does not purport to draw the line on all performance-enhancing drugs, because as new performance-enhancing drugs are discovered and tested they can be used as both the athlete and the monitoring doctor sees fit. This legislation solves the current problems surrounding performance-enhancing drugs and sports and addresses the current issues surrounding them. As technology develops in the future, subsequent issues can then be addressed to the best ability of that time based on that future information and scientific knowledge.

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\textsuperscript{121} Connolly, \textit{supra} note 2.
\textsuperscript{122} Raducan v. IOC, CAS OG 2000/011, Award of 29 September 2000, CAS Digest II, at 63. (Cited by Connolly, \textit{supra} note 2.)
\textsuperscript{123} \textit{Id.} (Cited by Connolly, \textit{supra} note 2.)
\textsuperscript{124} National Federation of High Schools, \textit{supra} note 13.
\end{flushleft}
Allowing performance-enhancing drugs will not prevent or stop current testing for recreational drugs like marijuana, cocaine, heroin, or methamphetamine. This is because recreational drugs do not enhance performance. The use of these drugs inhibits on-field performance because they rob an athlete of his skills and athletic ability. This is unlike performance-enhancing drugs, which make an athlete perform better. Further, drug tests for recreational drugs are cheaper, easier to perform, and are not as invasive because they only require urine samples.

Allowing performance-enhancing drugs will maintain the inherent fairness and competitiveness of sports because all athletes will have the choice to use and gain the benefits of performance-enhancing drugs. The goal of sports is to perform better than your competitors in some way, whether it is going higher, doing something faster or stronger. To this end, performance-enhancing drugs allow athletes to push their bodies to their very best. Using performance-enhancing drugs allows athletes to compete at the maximum limits of human capability, and thus do not change the essence of sports.

Performance-enhancing drugs are a natural step towards achieving the goal of sports—performing better than your competitor. They are just like weight lifting, plyometric exercises, specialized diets, and customized equipment because each one is an activity that allows athletes to improve their performance. Performance-enhancing drugs are not immoral because they help athletes reach their number one goal of being the best performer. Once these drugs are available to everyone, no athlete will be a cheater for taking advantage of an opportunity to improve themselves. Further, much like specialized equipment and training there will be some gap between athletes that can afford this opportunity and those that cannot, but that does not mean that the opportunity should be completely precluded. Athletes will not be forced to use performance-enhancing drugs, and those that choose not to take advantage of the opportunity
will be able to do so based on their own belief system. Additionally, no single athlete has the right to win or to play professionally and this will allow athletes to push themselves as hard as they need to achieve their goals. Unlike most of modern society, which rewards mere completion or participation, athletics only rewards performance; there will always be players that could have, should have, or would have been the winner no matter the circumstances.

The proposed legislation also makes the athletes assume the risk of using performance-enhancing drugs. This is because there are risks when using these drugs. Especially during the initial few years after the legislation is passed, when information and knowledge is developing, athletes need to be aware that there are risks taken if they choose to use performance-enhancing drugs.

Due to the assumption of risk by athletes using performance-enhancing drugs, doctors will only be liable for malpractice for failing to properly educate, monitor, or inform the athlete of their condition. This ensures that doctors will educate the athletes about the adverse effects as well as the benefits of using performance-enhancing drugs. Also, this will provide the certified doctors incentive to continuously monitor their athletes’ health to ensure that they are prescribing the correct dosage. This will create the mechanism for every athlete to find the correct dosage that will maximize the benefit these drugs provide while minimizing any of their adverse effects. Again, while some athletes may attempt to use more than the optimal level, the professional guidance, education, assumption of risk aspects will keep most athletes from abusing performance-enhancing drugs.

IV. TIME FOR CHANGE

Performance-enhancing drugs are a part of modern athletics. They improve athletic performance and can provide these benefits while presenting very few serious side effects. Despite the current uproar over the use of these drugs, these drugs have been, are, and will
continue to be used. The current laws governing these substances and the drug testing schemes in place to enforce those laws only create more problems than they solve. Further, they are based on a decades old perception that these drugs are completely unsafe to humans and the sports they play. The time has come to recognize that change is needed; by legalizing performance-enhancing drugs legislators and leagues will be able to take control of the situation and create a safer, better, and more fair environment. Athletes want and fans desire the benefits performance-enhancing drugs provide; so let’s make them legal.